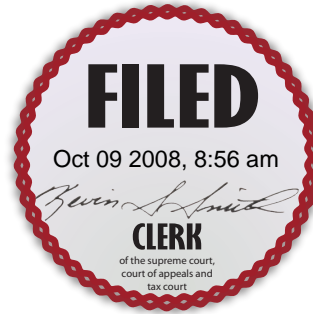


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HILLARD ALAN LUSH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0805-CR-463

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No.79D01-0705-FC-29

October 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Alan Lush appeals the sentence imposed after he pled guilty to possession of methamphetamine, a Class D felony, and admitted to being an habitual substance offender. On appeal, Lush argues that the trial court's inclusion of three years in community corrections as a condition of probation violates his plea agreement. Concluding that the trial court abused its discretion because the plea agreement did not authorize it to impose the three years of community corrections, we reverse and remand.

Facts and Procedural History

On May 11, 2007, the State charged Lush with the following crimes: operating a motor vehicle after driving privileges were forfeited for life, a Class C felony; auto theft, a Class D felony; possession of methamphetamine, a Class D felony; and being an habitual substance offender. Lush entered into a plea agreement whereby he agreed to plead guilty to possession of methamphetamine, a Class D felony, and admit to being an habitual substance offender. The State agreed to dismiss the remaining counts. The plea agreement further states:

2. That the defendant shall receive such sentence as this Court deems appropriate after hearing any evidence or argument of counsel. However, the executed portion on the defendant's sentence shall not exceed eight (8) years. In addition[,] the state will dismiss the Petition to Revoke in 79C01-0310-FC-31.
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5. That the defendant shall testify truthfully at any hearing or trial upon request, and any failure to do so shall be deemed a violation of any probation granted.

Appellant's Appendix at 26. The trial court held a plea hearing and took the plea of guilty, admission, and plea agreement under advisement until the time of sentencing.

The trial court held a sentencing hearing on November 9, 2007, and issued its sentencing order on November 13, 2007, in which it accepted the plea of guilty, admission, and the plea agreement. The trial court sentenced Lush to three years for possession of methamphetamine and enhanced the sentence by eight years for the habitual substance offender finding for a total sentence of eleven years. The trial court then ordered:

Eight (8) years of said sentence shall be executed at the Department of Correction. Three (3) years are suspended and the defendant placed on supervised probation with the Tippecanoe County Probation Department. As a condition of probation, the defendant shall complete three (3) years with Tippecanoe County Community Corrections at a level to be determined by Community Corrections.

As further conditions of probation, the defendant shall be evaluated by the Matrix Program¹ and follow any recommendations of Matrix and shall complete 90 NA² meetings in 90 days. Defendant may be considered for Home with Hope.³

Appellant's App. at 30. Lush now appeals his sentence.

Discussion and Decision

We review the trial court's sentencing determination only for an abuse of discretion. Ross v. State, 676 N.E.2d 339, 347 (Ind. 1996). Once a trial court accepts a plea agreement, it is bound by the agreement's terms and is obligated to impose the

¹ See The Matrix: Matching Offender with Treatment Resources, <http://www.nicic.org/Library/period161> (last visited October 9, 2008).

² See Narcotics Anonymous, NA, homepage, <http://www.na.org> (last visited October 9, 2008).

³ Home with Hope is a residential facility for male substance abusers who want and need help putting their lives together. See Home with Hope, Inc., <http://hometown.aol.com/recoverhope/home.htm> (last visited October 9, 2008).

sentence recommended in the agreement. Ind. Code § 35-35-3-3(e); Antcliff v. State, 688 N.E.2d 166, 168 (Ind. Ct. App. 1997). “[U]nless the plea agreement affords the trial court discretion in fixing the terms of probation, the trial court may not impose upon a defendant conditions that materially add to the punitive obligation.” Tubbs v. State, 888 N.E.2d 814, 816 (Ind. Ct. App. 2008) (quotations omitted). In imposing the sentence, the trial court possesses only that degree of discretion provided in the plea agreement. Although a trial court generally has broad discretion in setting conditions of probation, express conditions for probation contained in the plea agreement limit the trial court’s discretion to impose conditions of probation outside the scope of the agreement. Freije v. State, 709 N.E.2d 323, 324 (Ind. 1999); Tubbs, 888 N.E.2d at 817.

In Tubbs, this court had occasion to review a sentence imposed by the same judge as in this case under nearly identical circumstances. The plea agreement in Tubbs gave the trial judge discretion to impose sentences but required that the sentences be served concurrently and that the executed portion not exceed nine years. 888 N.E.2d at 817. Paragraph four of Tubbs’s plea agreement required, as a condition for any suspended sentence or probation, that Tubbs testify truthfully if called upon to do so. Id. The trial judge sentenced Tubbs to a total sentence of fifteen years with nine years executed and three years at Tippecanoe County Community Corrections at a level to be determined by Community Corrections. Id.

This court held that Tubbs’s plea agreement did not afford the trial court broad discretion in fixing the terms of probation, and therefore, the three years in community corrections after the nine-year executed sentence constituted an additional substantial

obligation of a punitive nature not authorized by the plea agreement. Id. This court then reversed the sentence and remanded for imposition of a sentence in accordance with the terms of the plea agreement. Id. at 818.

Here we are faced with the exact same circumstances and we follow our prior decision. Although we understand and respect the goal of the trial court to provide extra services that hopefully will enable defendants to overcome addictions and successfully reenter society, the court simply cannot accomplish the goal in this manner. We therefore hold that the trial court abused its discretion when it included three years in community corrections as a condition of Lush's probation. As a result, we reverse the sentence and remand to the trial court to either reject the plea agreement or to impose a sentence in accordance with the terms of the plea agreement.

Reversed and remanded.

NAJAM., J. and MAY., J. concur.